

## CASES / VONNISSE

### INJURIES SUSTAINED ON A DANGEROUS SIDEWALK: MUNICIPALITIES BEWARE!

**Dawn Pook v Nelson Mandela Bay Municipality  
and Emfuleni Resorts (Pty) Ltd  
Case no 3697/06 (SEC)**

#### 1 Introduction

Eight years have elapsed since the last so-called “municipality” case of note, *Cape Town Municipality v Bakkerud* (2000 3 SA 1049 (SCA)), was reported in our law reports. In that case we find a helpful summary of the approach of our courts to the issue of determining wrongfulness when municipalities face legal action due to injuries sustained by members of public caused by defects in the surface of sidewalks or roads under the control of such municipalities. This topic usually raises its head in the context of the application of the *omissio per commissionem* rule as a determinant of the possible wrongfulness of an omission which gives rise to harm on the part of a plaintiff (see Neethling, Potgieter and Visser *Law of Delict* (2006) 52-55; Van der Walt and Midgley *Principles of Delict* (2005) 86; and *cf* Roederer 2000 *Annual Survey of South African Law* 296-303).

It is now well established that prior conduct of the defendant, creating a potentially dangerous situation, is merely one of the considerations – albeit an important one – to be taken into account when assessing whether the defendant’s failure to take steps to protect another from suffering harm in the event of the danger materialising into causing detriment to such other person is to be regarded as a mere omission, entailing no delictual liability, or an actionable omission (*Minister van Polisie v Ewels* 1975 3 SA 590 (A) 597A; Neethling, Potgieter and Visser 55; and *cf* Boberg *The Law of Delict I – Aquilian Liability* (1984) 213 *et seq*). In the context of the possible civil liability of a municipality for injuries sustained by someone through a defect in a road or sidewalk surface, this expression of the importance of the prior conduct factor may, however, be misleading. Nobody will deny that the building of a road or sidewalk can be depicted as prior conduct on the part of a road-building authority in respect of damage suffered at a later stage by someone who uses such facility which has deteriorated into a state of disrepair (serious or slight); however, it is now well established that the mere existence of prior conduct of some sort on its own will not necessarily point

towards the existence of a duty on the part of the municipal authority to maintain its roads and thoroughfares in immaculate condition. The *boni mores* or “legal convictions of the community” (“canonised”, as it were, in *Minister van Polisie v Ewels supra* 597B) play an additional role in determining whether the omission in question is wrongful. Marais JA expressed himself as follows on this aspect in *Cape Town Municipality v Bakkerud (supra* 1056G):

“When it should be adjudged that such a demand [viz that the omission ought to be regarded as unlawful] exists cannot be the subject of any general rule; it will depend on the facts of the particular case.”

Here the *boni mores* test will always be applied as a “supplementary criterion” (Neethling, Potgieter and Visser 44) for purposes of refinement. It is probably an over-simplification to make a blanket statement that a “person acts *prima facie* wrongfully when he creates a new source of danger by means of positive conduct (*commissio*) and subsequently fails to eliminate that danger (*omissio*), with the result that harm is caused to another person” (Neethling, Potgieter and Visser 52). More in conformity with the general approach adopted in *Ewels* and the specific application of the *boni mores* test in *Bakkerud* would be to insert the phrase “take reasonable steps to” before “eliminate that danger” in the quotation contained in the previous sentence (see, *eg*, Van der Walt and Midgley 86).

The facts of the present case are straightforward and not complicated by the presence of defences pertaining to the absence of wrongfulness or negligence (par [12]). This makes it a good example to present to undergraduate students confronted for the first time by the intricacies of ascertaining the wrongfulness of an omission.

## 2 Facts and judgment

The plaintiff who was a guest at a hotel situated on Marine Drive in Port Elizabeth, left the hotel early one evening to join guests at a restaurant, located on the other side of the road. As she did not know her way around, she inquired from a security guard at the hotel entrance as to the location of the restaurant. After having informed her accordingly, the guard accompanied her along the sidewalk to a pedestrian crossing which would take her to her desired destination. However, before they reached the pedestrian crossing, she stepped into a rather deep hole in the pavement which was not easily noticeable, in spite of normal street lighting in the area, due to the fact that the paving was discoloured. She fell to the ground and injured herself in the process (par [4]-[5]).

The only witness called to testify on the plaintiff’s behalf was the general manager of the hotel where she resided at the time. Most relevant to the case at hand was his evidence that he had got in touch with the defendant municipality twice before the incident in which the plaintiff was injured to report the existence of the indentation in the pavement. The first time was about three months before the incident. After having spoken to an employee of the defendant, he gained the impression that the problem would be

attended to. After a month had elapsed and nothing had been done to repair the sidewalk, he made a further phone call to the same number and again gained the impression that remedial steps would be taken. At the time of the accident the municipality had still to effect the repairs requested. After the plaintiff's injury he got in touch with the same office again and took the official concerned to task in severe fashion for the municipality's failure to respond to his previous calls for repairs to be done. Two weeks thereafter he finally noticed that the indentation had been repaired at long last (par [8]).

On the defendant's behalf it was argued that as no evidence had been led to prove that the defendant had constructed the pavement and was responsible for its upkeep and maintenance, the court was bound to grant an order of absolution from the instance (par [9]-[10]). However, the defendant produced no further evidence to indicate that the failure on its part to repair the sidewalk was neither wrongful, nor negligent, nor that the plaintiff had herself to be blamed for contributory negligence (par [12]). In the face of this state of affairs Froneman J declined to issue the order prayed for on the defendant's behalf (par [9]). Instead, he accepted the sole evidence of the hotel manager to justify a judgment in the plaintiff's favour (par [11], italics supplied):

"His evidence thus forms an unchallenged basis from which the inference may legitimately be drawn that the defendant not only accepted its responsibility for the upkeep of the pavement, but also arranged for its repair after the plaintiff's accident. I doubt whether there is any other inference that could reasonably be drawn from his evidence alone, but at the very least I consider it the most probable inference that may be drawn from his evidence. *And that, in my judgment, is sufficient for the plaintiff to discharge the civil onus in respect of this aspect.*"

The court finally made an order compelling the defendant to compensate the plaintiff for the damage she had sustained due to her fall (par [14]). (The other parts of the order are not relevant to the present discussion.)

### **3 Critical comment**

#### *3.1 The prior conduct rule applied to municipalities*

Kemp (*Delictual Liability for Omissions* (unpublished doctoral thesis, UPE, 1979) 232) points out that "[i]t has been recognised in a number of cases that the plaintiff will have great difficulty in proving that the defendant's conduct created the harm-situation especially since the creation of the harm-situation and the actual materialising of the harm may be separated by many years". This comment is particularly applicable in the case of municipalities which build roads under permissive legislative measures. All contemporary text books contain many examples as well as discussions of the so-called "municipality cases" (see, eg, Neethling, Potgieter and Visser 52-55; Van der Walt and Midgley 86; and Boberg 45-46 212 221-222 236-237 239).

Previously municipalities could not be found liable in delict for detriment flowing from the mere failure to the municipality in question to repair or maintain a road; liability arose only if the municipality had introduced a "new

source of danger” by its road-building activity (*Halliwell v Johannesburg Municipal Council* 1912 AD 659 668-669; *Municipality of Bulawayo v Stewart* 1916 AD 357 361; *Cape Town Municipality v Clohessy* 1922 AD 4 8; *De Villiers v Johannesburg Municipality* 1926 AD 401 405-407; *Moulang v Port Elizabeth Municipality* 1958 2 SA 518 (A) 521G-H; and *Cape Town Municipality v Butters* 1996 1 SA 473 (C) 477C-D). However, the requirement of introduction of a new source of danger has now been abandoned in favour of the application of a standard in terms of which a duty to take positive steps to protect road users may arise when the road-building authority has constructed a road creating a potential risk of harm to traffic and pedestrians (which will be the case where any road is constructed, seeing that materials such as tarmac, paving tiles and cobblestones will in time deteriorate) and then fails to take reasonable steps to avoid the materialization of that harm; the reasonableness of the applicable steps will be determined by taking cognisance of the facts of each case where harm occurs (*Cape Town Municipality v Butters supra* 479E-480B; and *Cape Town Municipality v Bakkerud supra* 1059I-1060A).

### 3.2 *Evidentiary aspects in respect of proof of an actionable omission*

The defendant’s counsel applied for an order of absolution from the instance by arguing that the plaintiff had failed to discharge the onus of proving, in the first instance, that the defendant had in fact constructed the pavement and, secondly, that it was responsible for its upkeep and maintenance (par [9]). This was done after the only witness for the plaintiff, the general manager of the hotel where the plaintiff had resided, had given evidence. After Froneman J refused this application, counsel for the defendant closed his case without leading any evidence and merely repeated his two-tiered argument that no sufficient proof had been presented that the defendant had constructed the pavement and was responsible to keep it properly maintained (par [9]-[10]).

It would seem that the strategy employed on the defendant’s behalf was not in its best interests. This is evidenced by the decision of Froneman J with regard to the evidence furnished by the hotel manager (par [11], italics supplied):

“In my judgment the answer to this submission [by defendant’s counsel] is simple and straightforward. Mr. Odendaal’s [the manager’s] evidence was not challenged during cross-examination in any way that could affect his credibility. He could not remember the identity of the person or persons he spoke to on each occasion, but his reason for assuming that he had phoned the City Engineer’s department is logical and convincing. His evidence of his understanding, on each of the first two calls, namely that the municipality would attend to the problem, was not tested or probed in any way in cross-examination to suggest that he could have been wrong or mistaken in that understanding. *His evidence thus forms an unchallenged basis from which the inference may legitimately be drawn that the defendant not only accepted its responsibility for the upkeep of the pavement, but also arranged for its repair after the plaintiff’s accident.* I doubt whether there is any other inference that could reasonably be drawn from his evidence alone, but at the very least I

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consider it the most probable inference that may be drawn from his evidence. And that, in my judgment, is sufficient for the plaintiff to discharge the civil onus in respect of this aspect.”

The failure to test the credibility of the plaintiff’s witness, in conjunction with the failure on the defendant’s behalf to cross-examine the witness in order to cast doubt upon his understanding of the position taken by the municipal employee on behalf of the defendant municipality effectually sank the defendant’s case. When teaching the basic substantive principles of delict to students, law teachers are often not concerned about the adjectival law principles which accompany an effective application of the former. The present writer is of the opinion that one could go a step further and assert that private law lecturers in fact more than often neglect the evidentiary aspects of their subject. This case can serve as an illustration of the consequences of failing to follow a rigid, yet healthy, strategy in attacking the evidence furnished on behalf of your adversary in trial proceedings.

### 3.3 *Proper basis of defendant’s liability*

Froneman J proceeded to substantiate his judgment in favour of the plaintiff by specifically mentioning that the failure on the part of the defendant’s counsel to enter a plea of lack of wrongfulness or negligence on its behalf made it unnecessary for him “to deal with the issues of unlawfulness and negligence in relation to the facts of this case in any detail” (par [12]). He simply stated that the judgment in *Cape Town Municipality v Bakkerud* (*supra* par [28]-[32]: 1060B-1061E) formed the basis for his finding that the elements of wrongfulness and negligence had been established on the defendant’s part. This approach essentially has the effect of incorporating the relevant paragraphs cited from Marais JA’s judgment in that case as the *ratio decidendi* in the present judgment. This necessitates scrutinising those paragraphs in *Bakkerud seriatim*:

In the first paragraph referred to (par [28]) the Supreme Court of Appeal had stressed the fact that “[t]here can be no principle of law that all municipalities have at all times a legal duty to repair or to warn the public whenever and whatever (*sic*) potholes may occur in whatever pavements or streets may be vested in them” (1060D). In coming to this conclusion Marais JA considered various factors, *inter alia* contrasting a “miniscule and under-funded local authority with many other and more pressing claims upon its shallow purse” with a “large and well-funded municipality” (1061B-C). The court opined that it would be unrealistic to expect the former type of local authority to repair or to warn the public of all potholes in pavements or roads, to the same degree as one would expect from the latter (1061B-C). Froneman J obviously held the opinion that the Nelson Mandela Bay Municipality is a species of the latter kind and thus owed sidewalk and road users a duty to repair or effectively warn pedestrians of potholes like the one featuring in this case.

In the second relevant paragraph from *Cape Town Municipality v Bakkerud* (*supra* par [29]) Marais JA had drawn attention to the fact that the

“mere provision of a street or pavement by a municipality” does not *ipso iure* cast a duty on the relevant local authority to keep such street or pavement “in the pristine condition in which they were when first constructed” (1060E). This is a very important observation. After having been informed for the first time of the “prior conduct” rule pertaining to omissions, students are particularly prone to accept that the mere construction of a road or sidewalk will under all circumstances place the relevant road-making authority under a duty to keep such thoroughfare in such condition that it poses no danger whatsoever to anyone making use of it, or at least to put up signs warning road-users of any dangerous condition when such has manifested itself. My experience is that the best way to explain the *omissio per commissionem* rule, is to point out that the prior conduct (*in casu* the construction of a sidewalk or road) is at most an *indication* of the existence of a possible duty on the part of the local authority in question. Whether such duty exists in a particular situation must be determined by applying the well-known yardstick of the *boni mores* (cf Van der Walt and Midgley 86). In reality that is what Marais JA had been doing in *Bakkerud*, although he never used this terminology (or its equivalent, viz “the legal convictions of the community”) explicitly. One may safely assume that Froneman J applied the precepts of objective reasonableness as embodied in the *boni mores* test in concluding that the defendant did in fact owe members of public, like the plaintiff, a duty to repair or warn of the danger of which it had been well aware and that it had breached that duty.

In the third paragraph referred to in *Cape Town Municipality v Bakkerud* (*supra* par [30]) the Supreme Court of Appeal had wisely pointed out that “[i]t is not necessary, nor would it be possible, to provide a catalogue of the circumstances in which it would be right to impose a legal duty to repair or to warn upon a municipality” (1060G). These words simply bear out that in the process of applying the *boni mores* test to determine whether a duty to repair or warn exists, one is utilising an open-ended test which is incapable of being “concretised” into easily-applicable, simple rules (just as the other open-ended tests of the *diligens paterfamilias* for negligence or of reasonable foreseeability for legal causation do not concretise into miniscule rules for every conceivable situation).

In respect of the fourth applicable paragraph from *Cape Town Municipality v Bakkerud* (*supra* par [31]), the crucial point is the statement that the onus lies on a plaintiff in this type of case to prove not only the existence of a legal duty to repair or to warn on the part of the defendant, but also the element of negligence on its part by placing sufficient evidence before the court (1060I). Placing such burden of proof on the plaintiff’s shoulders also acts as a corrective to avoid the opening of the floodgates of litigation of which all local authorities stand in terror (1061A).

As pointed out above, Froneman J held that the plaintiff had discharged the onus on the strength of the evidence provided by the single witness. It is interesting to note that the court held that “Mr. Odendaal’s evidence was reasonably capable of grounding the inference that the defendant accepted its responsibility for the upkeep of the pavement and arranged for its repair

after the incident” (par [9]). As previously described (under 2 *ante*), the witness had on two occasions before the plaintiff sustained her injuries contacted the office of the defendant municipality’s city engineer to report the hole in the pavement and on both these occasions the official to whom he had spoken gave the assurance that the pavement would be speedily repaired. One now has to evaluate the relevance of these established facts to the question of determining the possible wrongfulness and negligence of the defendant in respect of its failure to address the problem.

As regards the wrongfulness issue, it is difficult to interpret the undertaking on the municipality’s part as constituting a contractual undertaking for the safety of a third party (see Neethling, Potgieter and Visser 63; Boberg 212 225 260; and *South African Railways and Harbours v Estate Saunders* 1931 AD 276). It would be unrealistic to interpret the telephone calls of the witness as a formal offer and the response on behalf of the defendant municipality as an acceptance thereof. Somewhat more realistic would be to view the conduct of the municipal officer as creating an impression that the interests of a third party will be protected (*Compass Motors Industries (Pty) Ltd v Callguard (Pty) Ltd* 1990 2 SA 520 (W); and see Neethling, Potgieter and Visser 64, especially authorities cited in fn187). However, the best interpretation would seem to be to accept that the conduct of the municipal officer was simply one of the circumstances which swayed the court to decide that the omission to curb the potential danger which came into being when the sidewalk had initially been constructed (referring to the category of “previous conduct”) had been unreasonable or *contra bonos mores* and therefore wrongful (see *Longueira v Securitas of South Africa (Pty) Ltd* 1998 4 SA 258 (W) 262B-E).

In respect of the determination of fault on the defendant’s part, the evidence in question provides a strong indication that the defendant had been negligent. Applying the time-honoured test formulated in *Kruger v Coetzee* (1966 2 SA 428 (A) 430E-F) to this situation, one can easily conclude that the defendant’s wrongful omission had been negligent: a reasonable person in the shoes of the official of the city engineer’s department would reasonably have foreseen the plaintiff’s injury and would have had no difficulty in being instrumental in the taking of reasonable preventative steps, which measures the local authority *in casu* failed to take. This interpretation provides a fine example of the double role that the same factual conditions can play, viz in relation to the establishment of both wrongfulness and negligence (without causing the conflation of these distinct delictual elements). In *Cape Town Municipality v Bakkerud* (*supra* 1060I-J) Marais JA pointedly drew attention to this fact:

“It is so that some (but not all) of the factors relevant to the first enquiry [viz to establish wrongfulness] will also be relevant to the second inquiry [viz to establish negligence] (if it be reached), but that does not mean that they must be excluded from the first enquiry.”

In the fifth paragraph of *Cape Town Municipality v Bakkerud* referred to (par [32]) Marais JA scrutinised the facts of that particular case, but also referred to the earlier position in our law when municipalities enjoyed a great

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measure of immunity against claims of this nature. Suffice it to remark that Froneman J obviously entertained no thoughts on granting even the slightest form of immunity to the defendant.

#### **4 Conclusion**

Although this judgment is extremely brief, one can safely assert that it contains more than meets the eye, in particular in the context of serving as a meaningful example to undergraduate students following a course in the law of delict. The following aspects can be highlighted:

- (a) This case provides a good example of the application of the “prior conduct” rule, in conjunction with the use of the more encompassing *boni mores* test to establish wrongfulness.
- (b) Furthermore, Froneman J followed a rather novel (but meaningful) approach by “incorporating” the *ratio decidendi* of a leading case (*Bakkerud*) as a major part of his own *ratio decidendi*.
- (c) Thirdly – in a more practical sense – this judgment sounds a warning to counsel representing a defendant in this type of case not to overestimate the daunting task of a plaintiff to provide sufficient evidence to prove the wrongfulness and blameworthiness of the defendant’s omission, which may lead to complacency on such counsel’s part.
- (d) Finally, it illustrates the fact that the same evidentiary material can be applied to prove different elements of delict, namely wrongfulness and negligence.

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